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From Guantanamo Bay to Abu Ghoraib: Challenging and Reconciling the Universality of Human Rights

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Abstract

Over the past few years, two events have radically transformed American identity and global perceptions of America with respect to human rights. The first of these is the detention of "enemy combatants" at Guantanamo Bay and the second is the abuse of prisoners at Abu Ghraib prison in Iraq. This paper considers how Guantanamo and Abu Ghraib have altered the intellectual and popular perceptions of human rights in America and abroad. The paper argues that the very different reactions to these events in the US and abroad suggest a move toward a relativist view of human rights in the US, limited by necessity and legality, but a universalist approach to human rights abroad. Moving toward a common global understanding of necessity and legality is critical to the pursuit of universal human rights. The reactions to Guantanamo indicate a growing acceptance in the United States of a relative conception of human rights. In the winter and spring of 2003, United States military forces at Abu Ghraib prison committed a range of often gruesome violations of Iraqi prisoners. When news and images of these abuses reached the media, the reaction in the United States was one of moral outrage and widespread condemnation. However, outside the United States, the reactions to both Guantanamo Bay and Abu Ghraib have been equally condemnatory and deemed violations of fundamental human rights. These international reactions are indicative of a growing universalist approach to human rights in the rest of the world and radically different perceptions of necessity and legality of human rights infringements. The critical distinctions between the reactions to Abu Ghraib and Guantanamo are based on the perceived necessity and supposed legality of the actions. The paper argues that

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resolving the differences over necessity and legality of human rights infringements is a necessary step in the pursuit of universal human rights and that the two events may provide insight into a shared understanding of necessity and legality. The first part of this paper tracks US reactions to Guantanamo Bay and Abu Ghraib in law, politics, and culture, suggesting a move toward a relativist perception of human rights, based on conceptions of necessity and legality. Part II looks to international reactions to Guantanamo and Abu Ghraib, suggesting that both have reinforced a universalist approach to human rights, rooted in very different understandings of necessity and legality. Part III explores both the international law and popular perceptions of the concept of necessity in an effort to explain the different reactions in the US and abroad and to offer insight into a common understanding of the term. The paper concludes by arguing that a move toward universal human rights in the post 9/11 era will require greater consensus in the US and abroad in both the law and popular perceptions of necessity in restricting human rights.

Keywords: Human Rights; Torture; Prison; International Law; Guantanamo Bay; Abu Ghraib.

Introduction

The development of the international system of human rights over the past fifty years has been marked by a long debate as to whether human rights are universal or relative, whether they apply to all or reflect particular local, national, or regional views and values. While this debate is and will continue to be significant, the international legal system which has enshrined these human rights into binding international commitments has progressively moved toward the universal. Beginning with the Universal Declaration of Human Rights of 1948, which, although merely aspirational, makes clear that human rights are intended "for all peoples and all nations."[1] Over the past five decades, countless treaties and other instruments at the regional and global levels have sought to transform the future aspirations of states into biding legal commitments.

Appropriately, there have been significant debates as to the scope of human rights protections and the margin of appreciation states may claim in implementing them. Occasionally, states and non-state actors have engaged in the systematic and wholesale violation of these rights. Yet, despite these debates and violations, the most fundamental human rights protections such as the prohibition on arbitrary execution, the freedom from torture, the protection of civilians in a time of war, and the right to a free and fair trial have garnered ever greater protection in international law and become more and more widely respected around the globe. While at times contesting the particular application of these rights, states have rarely contested their fundamental nature and, when violations have occurred, states and international organizations have been quick to condemn them. At least with respect to a limited core set of human rights, international law has moved beyond the universalist/relativist debate to create legal obligations binding on all states.

Over the past four years, however, a new, and perhaps the largest ever threat to the universality of human rights in the history of the movement has arisen. The potentially devastating consequences of international terrorism—apparent after September 11th 2001, have given states new, and often compelling reasons, to violate even that core set of universally applicable human rights. The policies and practices of the United States government at the Guantanamo Bay detention centre and the Abu Ghraib prison in Iraq are all too emblematic

1. Universal Declaration of Human Rights, General Assembly Resolution *217 A (III) of 10 December 1948*, at Preamble.

symbols of this new tendency of states to fundamental and universal human rights protections. While the threat of terrorism may have been the impetus for denial of some universal human rights, the policies of the US government since September 11th are representative of a fundamental challenge to the universality of core human rights. Recently released documents from the US government offer justifications for violations that strike at the heart of the claim to universal system of human rights protections.

Admittedly, states may have compelling reasons for the violation of human rights. The oft-cited hypothetical of torturing the terrorist who knows the location of a ticking nuclear bomb is, possibly, the most compelling example. Rhetoric such as this, frequently cited by US officials, can be difficult to counter and the slide toward a relativist approach to human rights can be tempting. If the universality of the human rights system is to be maintained, new mechanisms—both philosophical and legal—will be needed to reconcile the system's universality with the new threats states face. This paper explores the moves toward universality of core human rights in international law, the new challenge to universality posed by extraordinary threats from terrorist actors as reflected in US policy, and offers a potential means to reconcile the universality of the human rights system with such threats. Specifically, the paper suggests that asserting the non-derrogability of fundamental human rights provisions in international law, but recognizing limited claims to necessity in domestic law as a case-by-case defence for violations may maintain the universality of core human rights, while giving states limited freedom of action they claim in the present era.

Part I of this paper examines the universal character of the human rights movement, particularly the legal instruments governing the prohibition of torture and the protection of prisoners of war. Part II examines the challenge to universality presented by terrorism and reflected in US policy. Part III considers the ways in which the international law of necessity, coupled with strict accountability, may preserve the universality of human rights while recognizing the extraordinary emergency circumstances states may face.

This paper is not intended and should not be read as a justification for human rights violations in any instances. On the contrary, it seeks to reaffirm the universality of the human rights movement, but to do so in the modern context in which states face—or at least claim to face—extreme threats in relation to which they are willing to assert a more relativist approach to human rights and

engage in practices which violate basic international legal principles. Notwithstanding the violations that occur, a reassertion of universality may be the best hope for preventing a more widespread and lasting decline of the human rights system.

I. The International Law of Human Rights: Defining Universal Protections

The human rights movement has long struggled with the question of whether or not the basic rights protected are, in fact, universal. This paper approaches the debate from a legal, rather than strictly philosophical position, by assuming that human rights arise from the consent of state governments to those rights, usually in the form of international legal instruments. This approach recognizes that human rights as created by states and who recognize that states with different cultural systems may consent to and interpret rights differently. Pannikar, for example, asks: "Is the concept of human rights a universal concept?" and concludes: "no concept as such is universal…Each concept is valid primarily where it was conceived.[2]" This view was most clearly put into practice by Singapore's Lee Kwan Yew who developed the concept of a separate "Asian values" and suggested that "notions of absolute rights to freedom for individuals would sometimes have to be compromised in order to help maintain public order and security.[3]"

This state-centric approach to human rights contrasts sharply with a natural-rights based system of human rights. Rosalyn Higgins expounds: "I believe profoundly in the universality of the dignity of the human spirit. Individuals everywhere wan the same essential things…nothing in these aspirations is dependent on culture, or religion, or stage of development.[4]" Similarly, Ronald Dworkin contends that human rights must be universal due to the "intrinsic value of each and every human being.[5]"

This paper does not deny the validity or importance of natural-rights, but adopts the state-centric approach in an effort to develop a claim to universal human rights protections on their least favourable foundation. The state-centric view is, in fact, most sympathetic to the relativist side of the human rights

2. R. Pannikar, "Is the Notion of Human Rights a Western Concept", *DIOGENES* 20, no. 120 (1982): 75.
3. Han Fook Kwang; Warren Fernandez & Sumiko Tan, *Lee Kuan Yew: The Man and His Ideas*, Singapore: The Time, 1998.
4. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford Public International Law, 1994), 96.
5. Ronald Dworkin, *Taking Human Rights Seriously* (NJ: Princeton University, 2005).

debate for it recognizes that states have a choice as to whether to consent to such rights through the international legal system. Rosalyn Higgins, though herself an international lawyer, critiques this approach: "the non-universal, relativist view of human rights is in fact a very state-centered view and loses sight of the fact that human rights are human rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy and culture are concerned.[6]" The benefit, however, of starting from such a state-centric view, is that to the degree universality of human rights can be established, that universality must stem not from natural law, but from the real or tacit consent of states.

The legal regimes protecting human rights that have developed over the past fifty years are deeply grounded in the state-centric approach. Early instruments claiming the universality of human rights, such as the Universal Declaration on Human Rights, were merely aspirational in nature. Universal Declaration on Human Rights seek to develop a "common standard of achievement for all peoples and all nations" and refer to "all human beings" having identical and equal claims.[7] Yet, states merely pledged to strive for the fulfilment of such rights. Many of the most significant developments in the law of human rights have occurred through regional instruments that do not seek universal acceptance at all. Contrast, for example, the European Convention on Human Rights and the African Banjul Charter of Human and Peoples Rights. Whereas the European Convention stresses individual rights, the African Charter looks also to collective, group and family rights and emphasizes correlative duties.[8]

The courts, committees, and other mechanisms that have emerged to enforce human rights also take a state-centric approach that often seems to support the relativist side of the human rights debate. The strongest human rights enforcement mechanisms are found in regional, rather than universal, instruments such as the European Convention on Human Rights. The European Convention establishes the European Court of Human Rights and provides direct access for individuals to challenge violations of the Convention by their own governments.[9] Similarly, the Inter-American Convention on Human Rights and

6. Higgins, *Problems and Process*: … , 96.

7. Universal Declaration on Human Rights, Permeable.

8. Vincent O. Orlu Nmehielle, *The African Human Rights System: Its Laws, Practices, and Institutions* (Berline: Springer, 2001).

9. European Convention on Human Rights, at Art. 34. For a discussion, Christian Tomuschat, "Quo Vidas, Argentorantum? The Success Story of the European Convention on Human Rights—And A Few Dark Stains", *HUM. RTS. L. J* 13, (1992): 401.

its related institutions, the Inter-American Commission on Human Rights and Inter-American Court on Human Rights have proved relatively effective in policing violations of human rights and ensuring compensation for victims.[10] In other regions, enforcement of human rights has been far less effective because states have not created or consented to such enforcement mechanisms. Universal enforcement institutions, such as the United Nations Commission on Human Rights, have achieved far less in terms of compliance and enforcement.[11] The effectiveness of regional enforcement mechanisms is not surprising, given the greater willingness of states to consent to intrusive procedures within a region that may have more shared values, beliefs, and procedures.

Notwithstanding the comparative success of regional human rights instruments, even if one proceeds from the statist perspective of the international legal system, over the past half century a core set of human rights have emerged as universally applicable. Through state ratifications of international treaties and an expansion of customary international law, a small set of core rights have become on all or nearly all states. Among these core rights are, at the very least, the prohibition on torture, the right to fair trail and the protection of prisoners of war. The development of these rights into universal norms can be clearly traced through international legal instruments.

The universal legal prohibition on torture[12] has been affirmed in a number of international legal conventions at both the global and regional levels. The Universal Declaration on Human Rights, though merely aspirational, commits states to strive to ensure that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[13] At the global level, the first binding prohibition on torture is found in Article 7 of the International Covenant on Civil and Political Rights, which affirms: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or

10. William W. Burke-White, *Human Rights in the Inter-American System*. Tehran: INTERNATIONAL STUDIES, 2004; Cecilia Medina, "The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture", *Hum. Rts. Quarterly* 12, no. 4 (1990): 439-440.

11. Ann Kent, *China, the United Nations and Human Rights* (Pennsylvania: University of Pennsylvania Press, 1999).

12. For a discussion of the effects of such a universal right to freedom of torture for various actors, James Nickel, "How Human Rights Generate Duties to Protect and Provide", *HUM. RTS. Q.* 15, no. 1 (1993): 80, (arguing that "The claim to freedom from torture can be universal without all of the corresponding duties being universal, in the sense of being against everyone, or even to some worldwide agency. All that is required is that for every rights holder, there is at least one agent or agency with duties to protect that person from torture.")

13. Universal Declaration on Human Rights, Art. 5.

scientific experimentation."[14] As of 2005, 152 states from all major political, social, economic, geographic, and religious groups have ratified the convention. While this alone may be sufficient to demonstrate the "widespread and representative participation in a convention [that] might show that a conventional rule had become a general rule of international law,"[15] the prohibition on torture was reaffirmed in the 1984 Convention against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment. The Torture Convention clearly defines the crime of Torture, and thus the protected human right in question. In addition, it requires states to prevent and punish the commission of torture.[16] With 139 states parties, the Torture Convention goes still further to suggest that the freedom from torture is part of customary international law and among the core universal human rights.

Beyond international conventions, regional instruments from around the globe further protect the right to be free from torture. The Inter-American Convention on Human Rights memorializes a right to humane treatment and provides that "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."[17] Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms affirms the prohibition on torture at article 3 and the African Banjul Charter on Human and People's Rights provides that "All forms of exploitation and degradation of man particularly slavery, slave trade, and torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."[18] Likewise, the Cairo Declaration on Human Rights in Islam affirms: "It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity."[19] Taken collectively, these regional human rights instruments have garnered 124 ratifications. The extraordinary level of state acceptance of the right to be free of torture at both

14. International Covenant on Civil and Political Rights, Art. 7.
15. *North Sea Continental Shelf Case*, Federal Republic of Germany vs. Denmark, Judgment on the Merits, 20 February 1969.
16. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 *entry into force* 26 June 1987, in accordance with article 27 (1)
17. American Convention On Human Rights (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969) at Art. 5
18. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986
19. The Cairo Declaration on Human Rights in Islam, Adopted and Issued at the Nineteenth Islamic Conference of Foreign Ministers in Cairo on 5 August 1990, at Art. 20.

the global and regional level confirms the prohibition's status as part of customary international law and its applicability to all states

The universal nature of the prohibition of torture is further suggested by the fact that the right is recognized as non-derogable even in cases of national emergency or extreme necessity. The Torture Convention, for example, provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.[20]" While the European Convention generally allows derogation in "time of war or other public emergency," it specifically prohibits derogation from the prohibition on torture.[21] The fact that states are not permitted to violate the right to be free from torture even in the most severe circumstances is indicative of the fact that the right is guaranteed in an absolute or universal fashion.

A number of international judicial decisions have also affirmed that the right to be free from torture is among the few peremptory norms of international law—*jus cogens*—that apply to all states and can not be violated for any reason. Writing in the Pinochet case, the British Law Lords found that "torture has the character of *jus cogens* or a peremptory norm." This status, in the opinion of the Lord Browne Wilkinson, "articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate."[22] These findings have been confirmed by a number of international and regional courts, such as The Inter-American Court of Human Rights in the *Bamaca Velasquez Case* of 2000.[23]

With respect to the prohibition on torture, international law has sought to move beyond the debate over universality, by approaching the issue from the perspective of state consent. What emerges is an overwhelming acceptance of a right to be free from torture by states from all corners of the world, all religious, racial and political traditions. As part of customary international law

20. Torture Convention, at Art. 2(2).

21. European Convention on Human Rights and Fundamental Freedoms, at Art. 15(2).

22. *Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte* (No. 3) [2000] 1 A.C. 147 HL, Opinion of the Lord Browne-Wilkinson.

23. Bámaca Velásquez Case *[2000] IACHR 7 (25 November 2000) Judgment Of November 25, 2000.*

and *jus cogens*, that right to be free from torture is universal or as close to universal as any human right can be.

A second set of human rights, which has similarly attained universal or nearly universal status through the instrumentalities of international law is the range of fundamental protections accorded to prisoners of war. Among these is a right to a fair and independent trial. In some ways, the rights accorded to prisoners of war are distinct from other human rights in that they are guaranteed to a particular class of individuals—prisoners of war—rather than to all human beings. From that perspective, such rights are not universal human rights at all, but rather special protections for a unique group of individuals. Another way of viewing these protections for prisoners of war, however, is that they are reflective of basic human rights which all human beings are entitled but which particular groups—such as prisoners of war—may need additional or specific guarantees due to the greater danger of violation implied by their special status. The rights to a free and fair trial for prisoners of war seem to fall into this second category given that they have also achieved near universal status for all individuals as well as for prisoners of war.

The right to a free and fair trial is recognized around the globe, by all major political, social, religious, and cultural systems. The Universal Declaration of Human Rights states that everyone "is entitled in full equality to a fair and public hearing by an independent and impartial tribunal." The International Covenant on Civil and Political Rights further specifies the nature of these grantees that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[24] The Covenant also guarantees rights for the accused to examine evidence against him, to have a speedy trial and to be present for that trial.[25] The Inter-American Convention on Human Rights, the Cairo Declaration on Human Rights in Islam, and the Charter of the Fundamental Rights of the European Union all contain similar guarantees of judicial process, indicative of a right of universal application.

The right to fair and independent judicial proceedings is particularly important to and in danger for prisoners of war. Such individuals have fallen into the hands of an enemy who may find it expedient to violate fair trail rights.

24. International Covenant on Civil and Political Rights, at Art.14.
25. International Covenant on Civil and Political Rights, at Art.14

The international legal system has, therefore clarified and rearticulated the protection for prisoners of war. The right is found as early as 1929 in the Convention Relative to the Treatment of Prisoners of War.[26] The right was again reaffirmed in 1949 in the Geneva Conventions. Common Article 3 to each of the Geneva Conventions ensures that all persons "taking no active part in the hostilities" are protected from "The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[27] The Conventions are even more specific with respect to the protections accorded to prisoners of war. The Third Geneva Convention provides a general right to a fair trial by guaranteeing that "in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized."[28] The Convention provides detailed assurances of a range of more particular rights including the right to "present his defence and the assistance of a qualified advocate or counsel,"[29] the right to be tried "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,"[30] and the right to a speedy trail. The Red Cross commentaries to the Third Geneva Convention refer to these protections as "the minimum conditions which must be fulfilled by any court called upon to try prisoners of war."[31] In short, these provisions reinforce more general human rights protections for free and independent trial, guaranteeing them to a group most likely to have them violated—prisoners of war.

In order to ensure that anyone potentially deserving these reinforced protections for a free and fair trail is covered by the Geneva Convention Regime, the Conventions set a default assumption of protection. Article Four of the Third Geneva Convention specifies that protected prisoners of war are "Members of the armed forces of a Party to the conflict" or "Members of other militias and members of other volunteer corps" if they are "commanded by a person responsible for his subordinates;" have "a fixed distinctive sign

26. Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929, at Art. 69 (providing "A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power.")
27. Geneva Convention III, Relative to the Treatment of Prisoners of War, at Art. 3.
28. Geneva Convention III, Relative to the Treatment of Prisoners of War, at Art. 84.
29. Geneva Convention III, Relative to the Treatment of Prisoners of War, at Art. 99.
30. Geneva Convention III, Relative to the Treatment of Prisoners of War, at Art. 102. For an interpretation in the *traveaux preparatories*, see Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, p. 571.
31. Geneva Convention III, Relative to the Treatment of Prisoners of War, commentaries, at Art. 84.

recognizable at a distance," carry "arms openly," and conduct "their operations in accordance with the laws and customs of war."[32] As there may be some ambiguity as to who constitutes a protected person under the second part of this definition, the Convention provides default protection for anyone who has fallen into the hands of the enemy. Article 5 specifies that "should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[33] The Commentaries reiterate that "this provision should not be interpreted too restrictively" and that, therefore, anyone captured by the enemy must be treated as a prisoner of war until and unless they are found to fall outside these protected classes by a competent tribunal.[34]

The Geneva Conventions, which guarantee the fight of free and fair trial to prisoners of war, have achieved an extraordinary level of acceptance by states. One hundred and ninety two states have ratified the Geneva Conventions since they opened for signature in 1949. While some states have entered reservations with respect to various provisions in the Conventions, the rights set out in the Geneva Conventions are truly universal in terms of state ratification. In the words of the International Committee of the Red Cross, there has been "Universal acceptance of the Geneva Conventions."[35] Whether or not the right to a free and fair trial is applicable to every human being, it is clearly universal in its application to prisoners of war.

As regards two critical sets of human rights—the freedom from torture and the right to a free trial for prisoners of war—international law provides a solid foundation for the universality of such rights. Beginning from the perspective of state consent, the philosophical debate over universality vs. relativism can be avoided. States themselves have consented to respect these rights at an unprecedented level. Given the extraordinarily wide ratification of the legal instruments enshrining these protections, the status of these rights as part of the narrow corpus of universally applicable human rights is nearly unassailable.

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32. Geneva Convention III, Relative to the Treatment of Prisoners of War, at Art. 4.
33. Geneva Convention III, Relative to the Treatment of Prisoners of War, at Art. 5.
34. Geneva Convention III, Relative to the Treatment of Prisoners of War, commentaries at Art. 5.
35. International Commission of the Red Cross, Annual Report 1999, available at http://www.icrc.org/web/eng/siteeng0.nsf/iwpList171/039624EDFFD5FC9CC1256B66005EF202.

II. The Modern Challenge to Universality

Notwithstanding occasional and sometimes severe violations of human rights, the general trend over the past fifty years has been toward stronger protections and wider acceptance of human rights norms. The post-Cold War era has seen a particular advancement of the human rights movement. Yet, the events of September 11th 2001 marked a fundamental turning point. As Michael Ignatieff, writing in February 2002, suggests: "Since the end of the cold war, human rights has become the dominant moral vocabulary in foreign affairs. The question after Sept. 11 is whether the era of human rights has come and gone.[36]" Ignatieff's argument was intended to push the human rights movement "to challenge directly the claim that national security trumps human rights."

For many states, however, the new threats presented by terrorists, particularly when coupled with the potential acquisition of nuclear weapons, national security has come to trump human rights protections. When confronted with the possibility of tens or hundreds of thousands of deaths from a single terrorist act, states have appeared willing to compromise even universally applicable human rights protections. The threat of terrorism has, thus, presented the greatest challenge to the universality of human rights seen since the movement's inception in the 1950s. Mary Robinson, former U.N. High Commissioner for Human Rights, observes: "Repressive new laws and detention practices have been introduced in a significant number of countries, all broadly justified by the new international war on terrorism.[37]" Similarly, Kim Scheppele has documented the number of exceptions to international and domestic legal protections states have invoked under the cover of fighting terrorism.[38]

The policies of the US government after September 11th are reflective of a broader response by states to the threats posed by terrorist actors. In short, many states have concluded that human rights protections must yield to national security concerns. An examination of US policy post-September 11th, offers insight into why and how the threats posed by terrorism and state responses thereto have challenged the universality of core human rights norms. The US government has undertaken two policies—the use coercive interrogation techniques and the use of military commissions to try so called

36. Michael Ignatieff, "Is the Human Rights Era Ending?" *New York Times* (5 February 2002).
37. Mary Robinson, "Shaping Globalization: The Role of Human Rights", *AM. U. INT'L L. REV.* 12, (2003): 1-12.
38. Kim L. Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11", *U. PA. J. CONST. L.*, (2000): 1001.

"enemy combatants" at Guantanamo Bay—that may in part undermine claims to the universality of the human rights protections discussed in Part I.

This is not to say that US actions are equivalent in terms of numbers of victims or nature of treatment than, say, the genocide in Rwanda in 1994, the forced disappearance of persons in Latin America, or the current situation in the Darfur region of Sudan. Rather, US policies and practices are merely indicative of the response of many states in the modern era to put security before rights in extreme situations. Yet, the response of the US government to these new threats is particularly problematic for the universality of human rights because the US has consistently been one of the greatest proponents of human rights protections in other states around the globe. For a leader in the human rights movement with unrivalled military power, unmatched global hegemony, and remarkable status as both a real and rhetorical leader on the international scene, US policies threaten to undermine the universality of the core human rights of free and fair trail and freedom from torture.

The suggestion that the US response to terror may undermine the universality of human rights may, at first, seem surprising. After all, the 2002 US National Security Strategy committed to "champion the cause of human dignity" and to "press governments that deny human rights to move toward a better future."[39] While the United States has often been slow to ratify international conventions, the US has long been Party to the key legal instruments affirming the right to freedom from torture and free and fair trial for prisoners of war.[40] Moreover, the basic rights enshrined in these conventions have been fully implemented into US law. The Torture Convention was implemented into 18 USCS § 2340, defining torture and expressly prohibiting it.[41] The Torture Victim Protection Act goes even further, providing non-citizens with a right to bring civil suits for torture by "a foreign nation."[42] Similarly, the Geneva Conventions protections are enshrined in domestic law at 18 USCS § 2441 (with respect to grave breaches of the conventions).

Despite the significant domestic and international legal protections of the right to be free from torture and the right of prisoners of war to a free and fair

39. National Security Strategy of the United States (2002) at II.

40. The US ratified the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment in 1994, the International Covenant on Civil and Political Rights in 1992, and the Geneva Conventions in 1955.

41. There is some ambiguity in the US implementing legislation as to the protection against other cruel, inhuman and degrading treatment.

42. Torture Victim Protection Act, 28 USC 1350.

trial, since September 11th, 2001, the US response to terror has led to violations of these core universal rights. The photographs of detainee abuse at Abu Ghraib prison, now seen by millions of viewers around the world, speak for themselves.[43] The brutality of the images along with the smiling faces of certain US military personnel speak for themselves.[44] Alone they are a significant affront to the claim to universality of the freedom from torture. Soon after the release of the photos in April 2004, the US Army released an internal report authored by Major General Antonio Taguba, which found that "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees."[45] This "systematic and illegal abuse of detainees" included sexual mistreatment, forced nudity and coercion by dogs. The report suggested that these examples were not isolated incidents, but rather part of a more systematic program: "Other US Government Agencies… actively requested that MP guards set physical and mental conditions for favourable interrogations."[46] A deluge of released documents and media reports followed, confirming far more widespread abuse of prisoners than the initial photographs suggested.[47] Evidence of abuse of prisoners—ranging from death to broken limbs—in Iraq, Afghanistan and elsewhere has mounted. In his testimony before the US Senate on March 17, 2005 CIA Director Porter Goss "could not assure Congress that the Central Intelligence Agency's methods of interrogating terrorism suspects since Sept. 11, 2001, had been permissible under federal laws prohibiting torture."[48] What is clear from Abu Ghraib and elsewhere is that the US has been responsible for coercive interrogations that—at times at least—have crossed the line into the violation of the core right to freedom from torture.

The policies and practices of the United States government in Guantanamo Bay, like those in Abu Ghraib, have resulted in a challenge—whether intentional or not—to the universality of right to a fair trail as accorded to prisoners of war. In the aftermath of September 11th and the war in

43. For a discussion of the situation and background leading up to Abu Ghraib, Seymour Hersh, *Chain of Command: The Road From 9/11 to Abu Ghraib*, NY: Harper, 2004.

44. The pictures first aired on CBS News 60 Minutes Program on April 28, 2004. See, *Abuse of Iraqi POWS by GIs Probed*, CBSNEWS.COM: 60 Minutes.

45. MG Antonio M. Taguba, AR 15-6 *Investigation of the 800th Military Police Brigade*, at 16-17, available at http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm.

46. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

47. For a discussion of the broader context of such abuses, see Human Rights Watch, *Abu Ghraib Only The Tip of the Iceberg*, 27 April 2005, available at http://www.hrw.org/english/docs/2005/04/27/usint10545.htm.

48. Douglass Jehl, "Questions Left by CIA Chief on Torture Use." *THE N.Y.TIMES*, (March 2005).

Afghanistan, the US government established a detention facility at Guantanamo Bay, Cuba for so called "enemy combatants." Housed initially in makeshift structures, detainees were given no judicial recourse, no contact with attorneys or family and placed in what a British court termed a "legal black-hole."[49] At one point as many as 700 detainees were housed in Guantanamo and, as of early 2005 close to 550 detainees were still held at the facility.[50]

In November 2001, US President George Bush declared an "extraordinary emergency," issuing a Presidential Order establishing military commissions for the trial of detainees in Guantanamo Bay.[51] Taken together with subsequent procedures issued by the Department of Defence, the Presidential Order created commissions of five to seven military officers chosen by the Secretary of Defence to try Guantanamo detainees.[52] The commissions fall short of the basic protections for a free and fair trial accorded in human rights law and, particularly to prisoners of war under the Geneva Conventions. Specifically, they fail to provide civilian oversight, deprive defence counsel of the ability to prepare an adequate defence, restrict the defendant's right to choose his lawyer and keep some evidence secret from the defence.[53] The limited rights accorded by the Military Commissions were sufficiently troubling for a prominent international NGO to describe them as "fundamentally flawed" in a September 2004 letter to Defence Secretary Donald Rumsfeld.[54]

The justifications for these policies advanced by the US government are particularly troubling for the universality of these core human rights. To its credit, the US government did not ignore its international legal obligations or

49. *R. on the Application of Abbasi & Anor. v. Sec'y of State for Foreign & Commonwealth Affairs*, [2002] EWCA Civ 1598, para. 64 (U.K. Sup. Ct. Judicature, (C.A.), Nov. 6, 2002), available at http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html. For a more general discussion, Diane Marie Amann, *Guantanamo, 42 COLUM. J. TRANSNATIONAL LAW* 263, 267-69.

50. Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, NY: N.Y. TIMES, 2003: A1.

51. Presidential Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833-34 (Nov. 13, 2001)

52. Department of Defense Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), 2, 3(A), 4(A)(1)-(3), at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf [hereinafter Procedures order]; see Department of Defense Military Commission Instruction No. 8, Administrative Procedures, 3 (Apr. 30, 2003), at http://www.defenselink.mil/news/May2003/b05022003 bt297-03.html [hereinafter Instruction No. 8].

53. Human Rights Watch, *Briefing Paper on US Military Commissions*, Revised and Updated August 2004, available at http://www.hrw.org/backgrounder/usa/2004/1.htm

54. Human Rights Watch, *Letter to Defense Secretary Rumsfeld on the Military Commissions at Guantanamo Bay*, 16 September 2004, available at http://www.hrw.org/english/docs/2004/09/15/usdom9350.htm. For further analysis of the commissions, see Human Rights First, *Trials Under Military Order, A Guide to the Final Rules for Military Commissions*, October 2004, available at http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf

deny the existence of core human rights. Even in its recent legal submissions, the US government has affirmed that it is bound by its international legal obligations. In oral argument in the *Hamdi case*, Deputy Solicitor General Paul D. Clement noted: "I think the United States is signatory to conventions that prohibit torture and that sort of thing….And the United States is going to honor its treaty obligations."[55] Instead, the US government sought to reinterpret its international legal obligations to protect these rights narrowly, such that the rights were inapplicable to the individuals and circumstances in question. In so doing, the justifications for US policy challenged not the existence of such rights, but rather their universal applicability.

A series of recently released memoranda[56] articulate the US justification for the use of coercive interrogation techniques by military forces. Taken collectively, the memos reinterpret both domestic and international legal obligations so as to allow techniques that would otherwise constitute torture. Among the most significant of these documents is a memorandum from Assistant Attorney General Jay Baybee to White House Counsel, Alberto Gonzales. The memo examines US obligations under both international and domestic law, concluding that "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[57] With respect to mental suffering, the memo asserted: "For purely mental pain or suffering to amount to torture … it must result in significant psychological harm of significant duration, e.g., lasting months or even years."[58] Considering US obligations under the Torture Convention, the memorandum concludes that "by reserving criminal penalties solely for torture and declining to require such penalties for 'cruel, inhuman, or degrading treatment or punishment" the "treaty was intended to reach only the most extreme conduct."[59] The result of this interpretation was to restrict the definition of torture so far as to authorize acts that would have otherwise have been proscribed by international law.[60] Although the 2002 memo has been superseded by a 2004 interpretation recognizing a broader scope of

55. Transcript of Oral Argument in Hamdi v. Rumsfeld, No. 03-6696 (I.S. Apr. 28, 2004) at 49-50.

56. These memoranda have now been compiled into a 1000+ page book. *See* THE TORTURE MEMOS (2005).

57. *Memorandum from Jay Baybee to Alberto Gonzales*, August 1, 2002.

58. *Memorandum from Jay Baybee to Alberto Gonzales*, August 1, 2002.

59. *Memorandum from Jay Baybee to Alberto Gonzales*, August 1, 2002.

60. Note that the memo in no way provides a defense or relieves the US from its international legal obligations or liability for violations thereof. Domestic law is never a defense to international obligations.

protections from torture,[61] the 2002 memo offers a means for states to violate universally protected rights by reinterpreting those rights nearly out of existence.

The challenge to the universality of the right to be free from torture is further underscored by the limited accountability to date even for the most egregious incidents of abuse. Although a few low-level military personnel have been courtmartialed for abuse of Iraqi detainees, there has yet been no higher level accountability. Only seven low ranking soldiers, including a staff sergeant, a sergeant, four specialists and a private have received punishments up to ten years imprisonment.[62] More troubling is an April 2005 report of the Army Inspector General, finding no culpability on the part of the most senior military officials and only reprimanding one flag officer, General Karpinski, who had direct control over Abu Ghraib prison.[63] While some members of the US Senate are now calling for further independent investigation, no higher level accountability appears imminent.[64] It may be that no senior officers are responsible for these abuses, but in the face of mounting evidence that "high-ranking U.S. civilian and military leaders… made decisions and issued policies that facilitated serious and widespread violations of the law,"[65] the lack of high level accountability is troubling. If the right to freedom from torture is, in fact, universal as the international legal regime considered above indicates, at the very least that status requires acknowledgement and punishment of violations where they do occur.

As with justifications for coercive interrogation techniques, the explanations advanced by the US for the detention and trial of "enemy combatants" at Guantanamo challenges the universality of the rights in question. Whereas the US reinterpreted its obligations with respect to torture by advancing a particularly narrow interpretation of the substance of the right, it sought to limit its obligations to provide a fair trial to prisoners of war by limiting the scope of applicability of the right. On February 7, 2002, President Bush issued an

61. *Memorandum From Daniel Levin for James B. Comey, Deputy Attorney General*, December 30, 2004, available at http://www.usdoj.gov/olc/dagmemo.pdf (finding that "Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law…")

62. John W. Gonzalez, "Prosecutions Wind Down at Fort Hood: No one ranked higher than staff sergeant faces charges in the Abu Ghraib case", *THE HOUSTON CHRONICLE*, (April 4, 2005).

63. Josh White, "Top Army Officials are Cleared in Abuse Cases", *THE WASHINGTON POST*, April 23 2005.

64. Abu Ghraib Accountability, Review and Outlook, the WALL STREET JOURNAL, April 27, 2005 at A14.

65. *Getting Away With Torture, Command Responsibility for U.S. Abuse of Detainees*, Human Rights Watch Report, April 2005, available at http://www.hrw.org/reports/2005/us0405/

order, determining "that none of the provisions of Geneva apply to our conflict with al-Qaida in Afghanistan or elsewhere throughout the world"… and asserting "the authority under the Constitution to suspend Geneva as between the United States and Afghanistan."[66] The order concluded "that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al-Qaida, al-Qaida detainees also do not qualify as prisoners of war."[67] The result, of course, was that the fair trial provisions guaranteed in the Geneva Conventions would not apply.

President Bush's order referenced two earlier memoranda laying out the grounds for denying Geneva protections to Al Qaeda and the Taliban. The first of these, a memo from John Yoo, Deputy Assistant Attorney General, asserted that members of Al Qaeda were not protected because "a non-state actor can not be party to the international agreements governing war."[68] In addition, although Afghanistan was party to the Geneva Conventions, Afghanistan was a "failed state" "without the attributes of statehood necessary to continue as a party to the Geneva Conventions."[69] The second memorandum, from White House Council Alberto Gonzales to President Bush contended, over the objections of Secretary of State Colin Powel, that in order to "preserve flexibility" of US action, the Taliban must be treated not as "a government but as a militant, terrorist-like group."[70] As a result of these determinations, Secretary of Defence Donald Rumsfeld issued an order to the Chairman of the Joint Chiefs of Staff requesting them to instruct military commanders that "Al Quaeda and Taliban individuals...are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949."[71]

These justifications laid the groundwork for the denial of Geneva Convention rights to both al Qaeda and Taliban detainees and the subsequent trials by military commissions. In July 2003, President Bush issued a determination that six of the Guantanamo detainees were eligible for trial and a year later, in July 2004, charges were issued against Yemmini citizen Salim

66. Order Signed by President Bush, February 7, 2002. Available at http://lawofwar.org/Bush_torture_memo.htm
67. Order Signed by President Bush, February 7, 2002. Available at http://lawofwar.org/Bush_torture_memo.htm
68. *Memorandum for William J. Hayes, General Council, Department of Defense, from John Yoo, Deputy Assistant Attorney General*, 9 January 2002.
69. *Memorandum for William J. Hayes, General Council, Department of Defense, from John Yoo, Deputy Assistant Attorney General*, 9 January 2002.
70. *Memorandum for the President from Alberto R. Gonzales*, 25 January 2002.
71. *Memorandum from Secretary of Defense Donald Rumsfeld to the Chairman of the Joint Chiefs of Staff*, 19 January 2002.

Ahmed Hamdan, alleging conspiracy to commit murder and terrorism.[72] On August 31, 2004, after a series of revisions to the rules of procedure, the first cases were initiated against Hamdan and three other detainees, before commissions that would clearly violate basic human rights to independent trials accorded to prisoners of war under the Geneva Conventions, but for the determination that these detainees were unprotected enemy combatants.[73]

Throughout 2004, two legal challenges to the status of detainees in Guantanamo bay resulted in the suspension of the military commissions in October 2004. The case of *Hamdi et. Al. vs. Rumsfeld*, decided by the US Supreme Court in June 2004 determined that even enemy combatants held in Guantanamo Bay enjoy a right to *habeus courpus* to contest the legality of their detention. That decision made possible a challenge to the military commissions themselves in the case of *Salim Ahmed Hamdan vs. Rumsfeld*.[74] The District Court for the District of Columbia held that Hamdan was entitled to a status determination by a competent tribunal to determine whether he was a prisoner of war protected by the Geneva Conventions and that, certain procedures of the military commissions violate basic rights to counsel and to challenge evidence presented against him. Based on this decision by the District Court in Washington, Hamdan's trial before the military commissions in Guantanamo was immediately suspended.

While the US judiciary has sought to reaffirm the universality of the right to a free and fair trail as applied to prisoners of war, the justifications advanced for the Guantanamo military commissions are damaging for they seek to narrow the state's legal obligations by excluding certain groups from protections. In so doing, these justifications deny the universality of the rights created by the Geneva Conventions.

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US policies with respect to torture and the detention and trial of "enemy combatants" raise troubling concerns for the universality of core human rights. Unfortunately the policies and practices of the US government are reflective of a larger threat from a number of other states to the universality of core

72. Human Rights First, *The Military Commissions: An Overview*, available at http://www.humanrightsfirst.org /us_law/detainees/militarytribunals_overview.htm

73. Human Rights First, *Trials Under Military Order, A Guide to the Final Rules for Military Commissions*, October 2004, available at http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf

74. *Salim Ahmed Hamdan v. Donald Rumsfeld*, available at http://news.findlaw.com/hdocs/docs/tribunals/ hamdanrums110804opn.pdf

human rights norms. The actions of the United States government are, by no means, the worst human rights violations of the modern era and the US did not seek to deny the existence of the rights themselves. But, the justifications advanced in Washington cut straight to the heart of whether the freedom from torture and the right to a fair trail for prisoners of war are universal and owed to every human being or at least every member of a broad protected class. By narrowing the definition of torture and limiting the applicability of the Geneva Conventions, the US has taken the position has been that these rights are not universal, but rather limited to certain prohibited acts and some individuals.

III. Reconciling Universality with the Threat of Terror

Over the past four years, US policies have been defined, in large part by the events of September 11, 2001. As President Bush explained in February 2002, "Our nation recognizes that this new paradigm—ushered in not by us but by terrorists—requires new thinking in the law of war…"[75] In other words, the new threats that emerged in the wake of September 11th require, in Administration's analysis, new techniques and practices, some of which may violate core rights. Through cleaver lawyering, the Bush administration effectively interpreted the legal prohibition on torture and protections of the Geneva Conventions as derogaable in times of emergency, despite clear language to the contrary in the text of the legal instruments themselves.[76]

The United States is not alone in concluding that new threats require extreme measures even at the expense of the universality of human rights protections. The US is by no means alone in reaching this same conclusion. In the wake of September 11th, for example, the United Kingdom—another strong advocate of human rights internationally—adopted the Anti-terrorism, Crime and Security Act 2001,[77] the detention provisions of which directly violated article 5(1) of the European Convention for the Protection of Human Rights and

75. *Memorandum from the President*, February 7, 2002. Available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf

76. *Memorandum from the President*, February 7, 2002. Available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf

77. Article 5(1) of the Convention provides, in part "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a the lawful detention of a person after conviction by a competent court; b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law…" See *Anti-terrorism, Crime and Security Act 2001*, c. 24, 21-23 (Eng.) (detailing the new law of the United Kingdom for dealing with suspected international terrorists, through certification, deportation, and detention), available at http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm

Fundamental Freedoms (ECHR).[78]

The conclusion that human rights protections must yield to national security may be understandable, even unavoidable given the new and extraordinary threat presented by terrorists and their potential acquisition of weapons of mass destruction. An oft-cited hypothetical sheds light on the US interpretation. Take, for example, the situation where a terrorist has planted a nuclear device in the middle of New York City, Hong Kong, or London and he has been captured. Should he be tortured to determine where the bomb is planted so it can be defused and save millions of lives? Even if moral philosophers can make a compelling argument that torture is unjust even in this case, it is hard to imagine any national government would not use torture if necessary to locate the device.[79] Some go so far as to argue that, faced with such circumstances, any other choice would be "irresponsible" or even immoral.[80] While there may be far more grey areas of uncertainty in what occurred in Abu Ghraib or Guantanamo, many states have resolved the moral dilemma inherent in the hypothetical in favour of protecting its citizens, even if that means violating the rights of suspected terrorists.

In the face of new threats, it is hard to avoid the conclusion that states will favour national security over human rights. They have a strong incentive to use what ever means may be at their disposal to prevent serious terrorist acts. Certainly the failure of a national government to use any necessary means to prevent the detonation in such a case would result in a devastating electoral loss. The choice between hundreds of thousands of civilian lives and one act of torture may not be easy, but a national government charged with the protection of its citizens will resort to torture in such cases. And many of its citizens would find such action justified and maybe even morally correct.

Given the likely resolution of the dilemma in the hypothetical, the

78. Brice Dickson, "The Council of Europe and the European Convention on Human Rights", in *HUMAN RIGHTS AND THE EUROPEAN CONVENTION* 6 (Brice Dickson ed., 1997) (noting that the United Kingdom was the first country to ratify the European Convention on March 8, 1951). Article 15 of the ECHR, however, allows derogation from certain provisions in time of "war or other public emergency threatening the life of the nation." Rather than ignoring the convention or operating outside the law, the United Kingdom declared a public emergency so as to utilize the derogation provisions of the Convention. For a discussion, *see* Virginia Helen Henning, "Anti-terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation From the European Convention on Human Rights?*"* 17 *AM. U. INT'L L. REV.* 1263 (2002).

79. Kim Scheppele clearly disagrees with this point, arguing instead that "torture is always and absolutely wrong given the position we should accord to human dignity." Kim Scheppele, *Hypothetical Torture in the "War on Terror",* Journal of National Security Law and Policy (forthcoming 2005). Note however, that Scheppele deconstructs the hypothetical rather than accepting its nearly insurmountable consequentialist reasoning.

80. Richard Posner, "Torture, Terrorism, and Interrogation", in *Sanford Levinson, Torture: A Collection* (Oxford: Oxford University Press, 2006), 295.

universality of the rights to freedom from torture and free and fair trial for prisoners of war seem gravely under threat. Obviously the ideal means of ensuring the universality of core human rights is for states to respect those rights and preserve them in all circumstances. As a second best alternative, a number of proposals have been developed to allow states flexibility in their interpretations of core rights so as to protect national security. These include requiring a presidential authorization for each instance of torture to "torture warrants" issued in advance by courts.[81] The problem with these and other proposals that provide advance authorization for the violation of human rights by limiting their applicability, allowing derogation in times of emergency, or restricting the class of protected persons is that they can not be reconciled with basic doctrines of international law and the universal nature of these rights.

In the face of new and catastrophic threats, an alternate approach is needed that can reconcile the reality that states will at times prioritize national security with the universal nature of the rights in question. Any such approach must begin by acknowledging the universality of the rights in question—that they apply to all protected persons in all situations, even the extraordinary emergency presented by the hypothetical above. Similarly, to preserve the universality of the rights in question, no advance authorization for violation can be allowed. Any such *ex-anti* authorizations would be an acknowledgement by states that the rights are not universal and can be ignored in extreme circumstances.

One potential answer means of reconciling state behaviour with the universality of the rights lie in *ex-post* justification of violations at the domestic level. Such a model would require states to affirm and uphold their international legal obligations to prevent and punish torture and to provide protections to prisoners of war. In so doing, states would continue to recognize the universality of the rights in question. However, where violations of those rights do occur, the individual violators could present evidence of extreme necessity to justify their conduct in domestic law. Where an independent court deems the situation merited the violation in question—as would likely be the case with the hypothetical presented above—the justification of necessity could mitigate any punishment or relieve the individual of liability entirely.

This approach draws a distinction between international and domestic law,

81. Alan Dershowitez, *WHY TERRORISM WORKS* (Connecticut: Yale University Press, 2002); Philip B. Heyman & Sandford Levinson, "Can Torture Ever Be Justified?" *Bulletin of the American Academy of Sciences*, (Summer 2004).

seeking to affirm the universality of rights in international law, but allowing limited *ex-post* justification of violations in domestic law. At the international level, states would still have international obligations to recognize core human rights as universal and could face international legal responsibility for violations. States would not formally derogate from their obligations to protect these rights and the integrity of universal international human rights protections would be maintained.

At the domestic level states would likewise affirm the universal character of these rights by prohibiting violations in their domestic law and by investigating and prosecuting violations. States could, however, allow individuals accused of violating such rights to present a domestic legal defence of necessity based on the extreme circumstances surrounding the violation.[82] Such individuals could—where they judged that extraordinary circumstances required the violation of human rights—personally undertake acts in violation of core rights, thereby giving states and their agents limited freedom to act in cases of necessity. When states initiate an investigation or prosecution for violations of core rights, a domestic court could accept a defence of necessity if it agreed that the circumstances warranted the actions taken. The individual confronted with the nuclear terrorist in the hypothetical above would have no assurance that he will not be held accountable by a domestic court after the fact. In face, he would act knowing that he was violating both domestic and international legal affirmations of the core human rights. But, if an impartial court agrees with his determination, he could escape liability.

Rather than giving states or individual actors *carte blanche* authority to violate these rights, the *ex-post* justification approach creates the possibility of a narrow exception from liability for individual violators in extreme cases of necessity. A domestic judicial decision excusing liability would not contest the universality of the human rights in question. Instead, it would involve a finding that a violation of core rights had occurred, but that such a violation was justified by the necessity of the situation.

The difficulty in operationalizing the *ex-post* justification approach is the

82. A domestic legal provision allowing such a defence could read: "A person may be exempted from criminal responsibility for any act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on him or those he is bound to protect. Provided that he did no more than was reasonably necessary for the purpose and that the harm caused by him was not disproportionate to the harm avoided."

determination of the scope of necessity that would justify violation of core human rights. How grave or imminent must the threat be? How many lives must be at stake? International law—though not directly applicable to potential domestic legal defences—may nonetheless help inform the potential scope of acceptable necessity. The international law of necessity, which alleviates from liability of states for violations of treaty obligations is instructive. Article 33 of the International Law Commission Articles on International Responsibility of States allows states to invoke necessity for an act not in conformity with its international legal obligations only if "the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril."[83] In the Gabcíkovo-Nagymaros Project Case, the International Court of Justice accepted in part the justification of necessity in protecting an environmental interest, concluding that "that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation."[84] While the necessity defence is expressly precluded from violations of pre-emptory norms of international law—such as the prohibition on torture—and is not, therefore directly applicable here, it does inform any potential domestic law defences based on necessity. Namely, such a defence must be exceptional and an essential interest of the state at stake. A ticking nuclear time-bomb in a major city may well threaten such an essential interest, but the mere possibility that a particular captive may have information about a distant threat would not.

A second area of international law that may be useful in determining the allowable scope of the necessity defence is the law of self-defence. The law of self defence permits a state to violate the basic rule enshrined in Article 2(4) of the UN Charter, prohibiting the use of force against another state, when the state has been subject to an armed attack. In very limited circumstances, such force may be used pre-emptively to prevent an imminent attack. In the famous Caroline Case of1841, Daniel Webster argued that pre-emptive self-defence could only be justified if the state could "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and that the act "act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[85] Again, the international law of self defence is not directly applicable to a possible domestic legal defence for violations of core rights, but there are important

83. International Law Commission, Articles on the International Responsibility of States, at Art. 33.
84. *Gabcíkovo-Nagymaros Project* (Hungary / Slovakia) Judgment of 25 September 1997 I.C.J. Reports 1997
85. *Letter from Secretary of State Daniel Webster to Lord Ashburton*, April 24, 1841.

parallels. Where a state or its agents perceive a grave and imminent threat and, therefore, violate core human rights in an attempt to prevent that threat from materializing, it is effectively engaging in a form of pre-emptive self defence against an individual. International law suggests that such exercise of state authority must be based on an instant and overwhelming threat, no other means may be available to alleviate it, and the actions taken must be proportionate to the threat itself. Any necessity defence ought to be likewise strictly limited.

The international legal rules governing necessity and self-defence, though not directly applicable to a potential domestic legal defence of necessity for human rights violations, are nonetheless instructive. Together these two areas of international law suggest that any necessity defence must be very narrowly interpreted. Core interests of the state must be threatened. The threat must be instant. There may not be any other avenues of recourse available. And actions must be proportionate to the threat. In drafting, interpreting, or applying such a domestic legal defence, legislators and courts must bear in mind these limitations. The language of the statute or judicial interpretation must ensure his violation was the only possible way to prevent an imminent threat to a critical state interest and that the actions taken caused the least damage to the victim possible. A narrow interpretation of necessity based on these principles will provide the right incentives to individuals faced with the dilemma of the hypothetical above—a violation of core universal rights will only be excused in the most extraordinary and extreme circumstances.

Obviously, the best way to preserve the universality of core human rights is for states to respect those rights at all time and in all circumstances. Unfortunately, in the face of pressing terrorist threats, many states will prioritize national security over the protection of human rights. Rather than justifying violations in ways that undermine universality—such as limiting the substance of the rights in question or the scope of their applicability—allowing ex-post justifications of necessity for individual violations of human rights may be the second best alternative for preserving the universality of human rights in the face of new threats. While such a defence might not—and probably should not—be accepted for many of the examples of violations that have occurred in Guantanamo and Abu Ghraib, it would allow states and state agents the flexibility to deal with the instant and overwhelming threats such as that in the nuclear terrorist hypothetical presented above.

IV. Conclusion

International law has moved the legal status of core human rights protections beyond the universalist/relativist debate. Even from a state-centric perspective, the extraordinary level of ratifications of key legal instruments protecting human rights, suggests that core rights, such as the freedom from torture and the right to a free and fair trial for prisoners of war, have attained universal status. Yet, just as soon international legal universality has been achieved, the extraordinary new threats posed by terrorists have resulted in the most significant challenge to the universality of human rights ever seen. The actions of the United States government at Guantanamo and Abu Ghraib are reflective of the choices made by states in the face of such terrorist threats to prioritize national security over the protection of human rights. Such continued violations by any number of states seem nearly inevitable.

Unfortunately, any advance justification for the violation of core human rights—such as the US approach of narrowing the substance and scope of such rights—may serve to undermine the universal nature of the rights themselves. In the modern environment, alternative approaches that can simultaneously affirm the international universality of such rights and accommodate the inevitable reality of state responses to the threat of terrorism are needed. Allowing *ex-post* case-by-case domestic legal defences based on necessity while maintaining the integrity of the universality of the international system of rights protections may offer the best compromise between the protection of rights and the current practices of states. Moreover, such an approach may help avoid the excessive violations seen at Abu Ghraib by basing excusable violations in after the fact analysis of actual, instant, and overwhelming necessity and ensuring accountability where such necessity is not found.

Admittedly, allowing *ex-post* defences is a second best alternative to states actually respecting all core human rights even in extreme circumstances. But, as a second best alterative, this approach offers a means of preserving the universality of core human rights protections even in the extraordinary circumstances of terrorist threats.

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